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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 948

NEDRICK YOUNG, ET AL.,
Petitioners,

—against—

MOTION PICTURE ASSOCIATION OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

WILLIAM P. ROGERS
Attorney for Respondents
Motion Picture Association of America, Inc., et al.
1730 K Street, N. W.
Washington 6, D. C.

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FEDERAL RULES OF CIVIL PROCEDURE:

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This brief is submitted by Respondents in opposition to the petition for a writ of certiorari to review the judgment below (rehearing *en banc* unanimously denied, R. 605), which affirmed an order of the District Court denying a preliminary injunction in a private antitrust suit (J. A. 571).* This judgment is clearly correct, presents no important question of Federal law, involves no conflict of decisions and obviously does not call for the exercise of this Court's supervisory power.

*The letters "J. A." refer to the Joint Appendix printed in the Court of Appeals.

QUESTION PRESENTED

The first question presented by Petitioners (Petition, p. 2) in fact does not arise on this record. The question assumes, contrary to the Findings of the District Court, that at this interlocutory stage a concerted refusal to deal has been established and that the legal sufficiency of the defense of reasonableness to such an assumed state of facts is thereby in issue. No concerted refusal to deal has been shown and this purported question is not present here.

Although Petitioners attempt to raise a variety of other questions, in Respondents' view the question presented is: Where on the denial of a Motion for a Preliminary Injunction, the Proposed Findings submitted by prevailing counsel were adopted by the District Court, did the Court of Appeals apply the proper standards of review when it searched the record and found that there had been no "clear error or abuse of discretion" and further found that the District Court's action was "adequately based on the record made"?

STATEMENT OF THE CASE

Proceedings Below

This is a private antitrust action, brought by twelve Plaintiffs,* charging a conspiracy to exclude from employment in the motion picture industry individuals identified with Communism. The claimed conspiracy is alleged to have arisen in 1947 and to have injured Plaintiffs at various

*While the Motion for a Preliminary Injunction was brought in the District Court by all twelve of the Plaintiffs (J. A. 28), only five are Petitioners here. Conversely, while preliminary injunctive relief was not sought against three of the thirteen Defendants (J. A. 547), Petitioners have designated all Defendants as Respondents here.

dates beginning not later than 1953 (J. A. 568). It was not until December 30, 1960, that this action for injunctive relief and treble damages was begun (J. A. 2).

Prior to the hearing on the Motion for a Preliminary Injunction, answers and affidavits denying each of the material allegations of the complaint, including the allegations of a conspiracy were filed by each Respondent (J. A. 307-310, 517-544). The answers also raised several affirmative defenses, including *res judicata*, estoppel and release (see, e.g., J. A. 401-410). Respondents demanded a Jury Trial (J. A. 577).

The Motion for a Preliminary Injunction was not brought on for hearing until July 19, 1961, some seven months after it was filed (J. A. 547). An extended hearing thereon was had, and on July 24, 1961 the District Court caused a docket entry to be made denying the Motion.* The docket entry directed: "(Orders to be presented)" (J. A. 564). Petitioners, without waiting for such an order, appealed from the docket entry four days later (J. A. 565). At Petitioners' instance, the original record was quickly transmitted to the Court of Appeals (J. A. 578-579). Shortly thereafter, a motion for an expedited appeal, subsequently withdrawn on consent, was filed in the Court of Appeals (R. 581). On August 15th, Respondents served and filed Proposed Findings of Fact and Conclusions of Law (J. A. 566-570). No counter-findings or objections to Respondents' Proposed Findings were submitted by Petitioners. On September 11, 1961, the Proposed Findings and Conclusions were adopted by the District Court and an order denying the Motion for Preliminary Injunction was entered (J. A. 571). Thereafter

*The Court also heard and denied without prejudice Petitioners' "Motion to Strike Defendants' Affirmative Defenses and to Dismiss Counterclaims" (J. A. 564).

Petitioners appealed from the order of the District Court, which Appeal was consolidated with the earlier purported Appeal (R. 586).

Following affirmance of the District Court's order on January 18, 1962, Petitioners sought a rehearing *en banc* urging substantially the same grounds as are sought to be raised here (R. 594). That Petition was unanimously denied by the full Court (R. 605) and the instant Petition followed.

The Record Below

The Petitioners' Statement of the Case is wholly inaccurate and misleading because it is premised squarely on the proposition that a conspiracy has been found and established by undisputed facts (Petition, pp. 5-7). The District Court found that no such conspiracy had been shown on the record made on the subject Motion (J. A. 568). The Court of Appeals affirmed (299 F. 2d 119).

Actually, Petitioners' "undisputed facts" are based largely upon self-serving affidavits replete with hearsay, conjecture, speculation and argument. (See, e.g., J. A. 32, 64, 74, 139, 174). Thus, in the District Court three of the Petitioners moved for summary judgment upon the same affidavits which were the basis of the preliminary injunction motion. After Respondents challenged the competency of these affidavits by filing a motion to strike (J. A. 516(20)), Petitioners withdrew, without prejudice, their summary judgment motion.

And when Petitioners speak of "undisputed" facts consisting of "documents" (Petition pp. 5, 21) they are referring *inter alia* to such things as old newspaper and magazine

articles (e.g. Exh. 11-J. A. 72, Exhs. 13-16-J. A. 72; J. A. 214(5), 214(12), 214(18)); an unissued press release (Exh. 17-J. A. 72-73), copies of unauthenticated letters (e.g. J. A. 219-223) and even what purports to be a transcript of a telecast by a news commentator (Exh. 23-J. A. 84).

Other "documents" which serve as the foundation for Petitioners' distribution-financing argument (Petition, p. 11, fn. 15) consist of one undated, unexecuted document purporting to come from the files of one of the Respondents (J. A. 382(1)-389(1)) and an excerpt from another document, said by two of Petitioners to be "typical" but otherwise unidentified and unauthenticated (J. A. 80, 147).

No purpose would be served by a lengthy recitation of the record at this point. As the District Court itself found (J. A. 568):

> "11. The many factual issues raised in this case by the parties are not susceptible of resolution at this preliminary stage and it is apparent to the Court that a trial must be had and all the facts fully explored at that time."

The facts material to this case commenced in 1947. At that time, a group of individuals, identified with the motion picture industry, including some of Petitioners, appeared before the House Un-American Activities Committee. Their conduct and testimony there was such as to bring public obloquy not only upon themselves, but also upon the entire motion picture industry as well (J. A. 201-10, 259(1)-(4), 551). The continuing problem created for producers and distributors of motion pictures was recognized by the District Court which found (J. A. 567-568):

> "10. The record is clear that each producer-and-distributor defendant has been faced with identical

> or similar problems in regard to the employment of individuals identified as being Communists or having Communist connections, in that the employment of such individuals has led to protests by members of Congress and the public, picketing and threats of boycotts by various civic and patriotic groups, posing a threat to the economic well-being of each defendant."

Petitioners now assert, and claim they have proven, that in meeting these problems the Respondents created a conspiracy to maintain an industry wide blacklist of communists. The District Court held directly to the contrary, finding (J. A. 568):

> "The record is insufficient to show that the defendants, in attempting to deal with these legitimate business problems have acted in concert or pursuant to a conspiracy or that they have maintained an industry-wide blacklist. Rather the record is consistent with the conclusion that each defendant acted individually non-conspiratorially and in a reasonable manner."

Contrary to Petitioners' assertion, the truth is that at this early stage nothing has been proven. The facts are all in sharp dispute and the issues which Petitioners assume they have proven remain to be resolved at the trial.

REASONS WHY THE WRIT SHOULD BE DENIED

Introduction

The interlocutory nature of the order denying a preliminary injunction precludes review by this Court in the absence of exceptional circumstances, not present here. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133; *American Const. Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384.

Further, it should be noted that Petitioners do not seriously challenge the other grounds held by the Court to preclude the relief sought.* These include: (a) laches; (b) lack of irreparable injury; (c) the existence of an adequate remedy at law; and (d) the lack of a reasonable certainty that Petitioners would ultimately prevail. The existence of these factors also serves as a bar to injunctive relief.

I

THE SUBSTANTIVE ISSUE OF REASONABLENESS DOES NOT ARISE UPON THIS RECORD.

The only substantive issue of law which Petitioners seek to raise at this time is whether reasonableness is a defense to an alleged concerted refusal to deal (Petition, pp. 16-18). The issue, however, does not arise upon this record. No concerted refusal to deal has been shown. Petitioners' allegations in this respect have been vigorously denied by the Respondents and found without support in the record by the District Court.

Petitioners cannot simply assume the existence of a conspiracy, contrary to the facts and the record and the Findings below. On the conspiracy issue, and on all the other controverted issues, Respondents are entitled to their day in court. This Court has just recently warned that summary procedures should be used sparingly in complex antitrust litigation, and that "Trial by affidavit is no substitute for trial by jury which so long has been a hallmark of 'even

*The only attention which Petitioners pay to these grounds is to make again an unfounded assumption (Petition, p. 22) that the Court of Appeals "apparently" decided the case in the light of the facts existing as of the date the action was commenced. Nothing in the record supports this assumption.

handed justice". *Poller v. Columbia Broadcasting*, 368 U. S. 464, 473. See *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136, 142.

Unless and until the Petitioners can prove and not merely allege a conspiracy, there is no reason for this Court to consider, in the abstract, this or any of the other many legal issues which may arise in the course of anti-trust litigation. Accordingly, consideration of the substantive question sought to be raised at this time would be unwarranted.

II

PETITIONERS' CLAIMS REGARDING THE FINDINGS OF FACT ARE LACKING IN MERIT.

Petitioners did not object to the Proposed Findings or the counter findings, although they had a month to do so. Nor did they move to amend the Findings once made. This but highlights the want of merit to the various claims now urged (Petition, Points II, III & IV) respecting the alleged manner in which the Findings were made.

On July 24, 1961, a docket entry was made in the District Court denying the Motion for a Preliminary Injunction and directing (J. A. 504) "(Orders to be presented)." Clearly this was not yet an appealable order. Cf. *U. S. v. Schaefer Brewing Co.*, 356 U. S. 227, 232-233; *United States v. Hark*, 320 U. S. 531. Petitioners' first Notice of Appeal, filed on July 28, 1961, was therefore premature, and the claim (Petition pp. 21, 24) that, thereafter, the Court was without jurisdiction to make the findings, frivolous.*

*Equally insubstantial is petitioners' attempt to create an issue from the statement in the Court of Appeals' opinion that the findings were made in accordance with "Fed. R. Civ. P. 52(b)" (Petition p. 19). Obviously, this is a typographical error. The Record is perfectly clear, as Petitioners are aware, that the Findings were made pursuant to Rule 52(a).

The question whether the Court of Appeals should have reviewed the Findings "uninhibited by the 'clearly erroneous' rule" (Petition p. 18) simply does not arise on this record. There is nothing to show that that Court's decision turned on the weight or deference (Petition, p. 16) accorded the Findings under that rule.

Rather, it appears that the Court of Appeals followed its normal practice, *Cox v. Democratic Central Committee*, 200 F. 2d 350 (D. C. Cir. 1952), and searched the record to determine whether there had been "clear error or abuse of discretion". It found none. To the contrary, it found that the District Court's action was "adequately based upon the record made"* (299 F. 2d at page 121). Thus, the issue which Petitioners seek to pose is not present in this record.

Even if the Court of Appeals' decision had hinged on the weight or deference to be given the Findings under the "clearly erroneous" rule, no substantial question could arise. Petitioners' criticisms of the Findings, based on the manner in which they were allegedly made, are captious. Basic to these criticisms is the claim that the Findings were not those of the District Court since they were drafted by prevailing counsel (Petition, pp. 18-20, 24). This contention is baseless. *U. S. v. Crescent Amusement Co.*, 323 U. S. 173; *Schilling v. Schaitzer-Cummins Co.*, 142 F. 2d 82 (D. C. Cir. 1944). The test is not who prepared the Findings, but rather, whether they are supported by the evidence. As this Court said in the *Crescent* case at pages 184-185:

*The frivolous nature of these criticisms is demonstrated by the repeated contention that the District Judge could not "check" the Proposed Findings (Petition pp. 18, 24) since the record was in the Court of Appeals. If this were a problem, it was created by Petitioners' premature appeal. The fact is, of course, that the record was as available to the District Judge and his staff in the Court of Appeals as it was in the files of the District Court. Furthermore, the Proposed Findings were presumably checked by Petitioners who filed no objections or counter-findings thereto.

> "The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See United States v. Forness (CCA 2d) 125 F. (2) 928, 942-943. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are."

Here the Court of Appeals found the action of the District Court to be "adequately based on the record made" (209 F. 2d at page 121). Under the rule of *Crescent, supra*, this was the review required.

The fact is that the same test is applied to findings "whether the Court prepared them or adopted those submitted by counsel. The court's adoption of appellee's findings does not impeach or discredit them. We accord them full weight." *Edward Valves, Inc.* v. *Cameron Iron Works, Inc.*, 289 F. 2d 355, 356 (5th Cir. 1961), *cert. denied*, 368 U. S. 833.

Petitioners' efforts to show a conflict among the Circuits, in this area, are fruitless. We have previously shown that the question of review "uninhibited by the 'clearly erroneous' rule" does not arise here and, therefore, an alleged conflict in regard thereto among other Circuits is of no moment. In point of fact, examination of the cases cited (Petition, p. 19) reveals that no conflict actually exists. Thus, in *Tanker Hyarade, No. 24* v. *The Dynamic*, 213 F. 2d 453 (2nd Cir. 1954), and *Mesle* v. *Key Steamship Corporation*, 260 F. 2d 747 (3rd Cir. 1958), *cert. denied*, 359 U. S. 966, the Second and Third Circuits actually applied the "clearly erroneous" rule. As to the Fourth Circuit, see *Chicopee Manufacturing Corp.* v. *Kendall Company*, 288 F. 2d 719, 724 (4th Cir. 1961), which follows the *Crescent Amusement* case, *supra*.

On this interlocutory order denying a preliminary injunction, Petitioners received the review to which they were entitled. Accordingly, no substantial question, conflict of decisions or occasion for the exercise of this Court's supervisory power arises.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted.

WILLIAM P. ROGERS
Attorney for Respondents
Motion Picture Association of America, Inc., et al.
1730 K Street, N. W.,
Washington 6, D. C.

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